Supreme Court, U.S.
APR 26 1993
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Case No. 92-1704

IN THE

Supreme Court of the United States

October Term 1992

McCLELLAND C. SMITH, Petitioner

V.

UNITED STATES, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

McCLELLAND C. SMITH
4524 Shawnray Dr. #24
Middletown, Ohio 45044
(513) 424-2210
Petitioner Pro-se

QUESTIONS PRESENTED FOR REVIEW

1. Was enlistment contract ever "VALID"?
2. Was National Guard Regulation 25 Paragraph 56c a REJECTION OF ENLISTMENT?
3. Discovery of ERROR, and the ALTERATION Did that change enlistment papers into LEGAL ENLISTMENT CONTRACT?
4. What is status of Military Service by petitioner after about August 15, 1951?
5. What OBLIGATIONS did Military ASSUME by ENFORCING THIS "IMPOSED CONTRACT"?
6. Did the Army have AUTHORITY TO TERMINATE THIS "SUPPOSED CONTRACT"?
7. Did Statute of Limitations START TO RUN?
8. Did this service VIOLATE 13th AMENDMENT TO U.S. CONSTITUTION?
9. Can 28 U.S.C. § 2501 Statute of Limitations be applied to Appeals under Title 10 U.S.C. § 1552(b)?

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. _____

McCLELLAND C. SMITH

PETITIONER,

V.

THE UNITED STATES

RESPONDENTS.

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PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

The petitioner, McClelland C. Smith, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered on February 9, 1993.

OPINION BELOW

The Court of Appeals entered its ORDER affirming the Claims Court decision on February 9, 1993. Copy (App. pages 1 --5)

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1491 of the Tucker Act and 10 U.S.C. § 1552.

STATEMENT OF CASE

Petitoner will present case in THREE TIME FRAMES, enlistment, discovery of error, and service after discovery of error. 28 U.S.C. § 2501 and 10 U.S.C. § 1552 will follow with Questions for Review on each.

ENLISTMENT UNTIL ERROR DISCOVERED

Was the enlistment contract ever "valid"? The Army Board for Correction of Military Records (ABCMR)(Board) EVIDENCE OF RECORD App. pages 14 through 16 shows enlistment violated National Guard Regulation 25 at paragraph 56c. In ORAL ARGUMENT page 36(App. pages 21 - 22) the Claims Court says, "But the fact that this error was made and corrected by Chandler, if that's all that happened, that would not give you any rights to a greater amount of pay than you were paid." Continuing the Claims Court mentions they would not allow any officer to make a contract to pay more than the regulations and the statute allowed him -- authorized him to make. The Claims Court ignored Iselin v. United States, 46 S.Ct. at 459 on acceptance of a proposal on terms varying from those offered is a REJECTION of offer.

In the next paragraph, (App. p. 22) the Claims Court says, "And so, if an error was

made in designating you a Corporal, and the paper, in fact, should have been filled out as a PFC under the regulations, that's what had to be done." La Compania Bilbaina De Navegacion v. Spanish-American Light & Power Co., 146 U.S. 483, 13 S.Ct. 142 at 148 says "But if there is any part of it in regard to which the minds of the parties have not met, the entire instrument is a nullity as to all its clauses." Petitioner's mind met only on the GRADE OF CORPORAL - NOT PFC.

Petitioner respectfully submits there was NOT a "valid" enlistment contract based on July 10, 1951 enlistment in Ohio National Guard, and the National Guard knew this.

DISCOVERY OF ERROR

The ABCMR Memorandum of Consideration had with it the Ohio National Guard staff advisory opinion (App. pages 18 & 19) in Item 2 says Mr. Smith's enlistment record was "amended" -- the "correction" was made by unit commander and there is no indicat-

ion at what time the correction was made. Continuing the staff advisory says, National Guard duty performed for July 1951 lists Mr. Smith name under Corporal column, it was deleted and relisted under the Private First Class column. Petitioner ENLARGED A PART OF THIS DUTY REPORT FOR JULY 1951. THE PART THAT LIST PETITIONER AS PFC. IT IS IN LAST PAGES OF APPENDIX. It show petitioner attended 2 drills and has notation, "Sol enl as -fc instead of Cpl as shown on NGB Form 21". The TWO DRILLS are for the 10th and 31st of July, 1951.

The notation shows National Guard and Army intended to ENFORCE A CONTRACT THEY KNEW WAS INVALID. Petitioner calls attention to OATH AND CERTIFICATE OF ENLISTMENT - and the words, "for a period of 3 years under the conditions prescribed by law, unless sooner discharged by proper authority. It was then the Ohio National Guard's RESPONSIBILITY TO DISCHARGE PETITIONER WHEN THE

NATIONAL GUARD DISCOVERED THE ERROR. Title 32 U.S.C. § 322(a)(2) - Discharge of enlisted members, HISTORICAL AND REVISION NOTES refers to opinion of the Judge Advocate General of the Army (JAGA 1953/9033, 3 Dec.1953) relates to Federal Recognition. U.S. - In re Blackington, D.C. Mass., 245 F. 801, affirmed 248 F. 124, page 803, "Voluntary enlistment rests on a contract between the recruit and the government. The Contract is based on his offer of service and the acceptance by the military authorities." Farther down it says, "Whether the contract is binding is determined by the principles of law applicable to contracts generally." Duress, fraud, misrepresentation, avoid a contract of enlistment, as they would any other contract. In re Grimely, 137 U.S. 147.

Blackington, as well as, Grimely, are writ of habeas corpus cases, petitioner discussed this issue in ORAL ARGUMENT page 38, (app. 23 & 24). Court rejected this

ARGUMENT. It is clear the National Guard altered the GRADE of enlistment to conform to National Guard Regulation 25, Paragraph 56c. The Claims Court errored by NOT FINDING ENLISTMENT "INVALID", because of admitted violation of above regulation. The Court of Appeals errored, by affirming the error.

SERVICE AFTER DISCOVERY OF ERROR

It is clear that petitioner's enlistment in Ohio National Guard was NEVER VALID, and since it was never valid, Grimely v. United States, 137 U.S. 147, 11 S.Ct. 54 would not apply at this point, BUT WOULD OPERATE AGAINST THE GOVERNMENT FOR SERVICE PETITIONER PERFORMED AFTER ABOUT AUGUST 15, 1951. The Government, through its agents, the National Guard and Army - ILLEGALLY EXERCISED ITS SOVEREIGN POWER TO COMPEL PETITIONER TO HONOR AN ENLISTMENT CONTRACT IT KNEW WAS INVALID. Grimely shows that, "Enlistment is a contract, but it is one of those contracts that change the status, and where that

is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes." Thus after petitioner, signed the enlistment form, he could not be sure whether it was legal or not, to desert could be long prison term. Grimely makes it clear it is INJURED party and NOT WRONG-DOER that can obtain relief and a change of status by judicial action. CHANGE BY JUDICIAL ACTION.

When the Natioal Guard and Army continued the enlistment, after the error was discovered, the Government assumed a greater obligation to petitioner, than had the enlistment been legal. The terms of the service or the service had not been agreed to by petitioner and the government. The obligation had no time limits or expiration date. The Army is a party to the dispute. Then can the Army by regulations issue a release? The Army would then judge its own case. Is that legal? Ex Parte Ellis, 105 Pacific Re-

porter 184, at 186 -- "No man can be a judge of in his own case." The Court of Appeals notes, petitioner says, that Claims Court erred by failing to consider letters written during statute of limitations period. Petitioner was not even required to do this to maintain status of soldier (since Army had deliberately and illegally placed petitioner in that status). Thus the Army had NO AUTHORITY TO RELEASE PETITIONER FROM ACTIVE DUTY. Grimely, 137 U.S. 147, ONLY INJURED PARTY CAN OBTAIN RELIEF AND CHANGE OF STATUS BY JUDICIAL ACTION. the Army would be judge of dispute it was a party to. SINCE PETITIONER HAS NOT BEEN LEGALLY RELEASED BY THE ARMY, THE CLAIMS COURT CITING OF Hurick v. Leman, 782 F.2d. 984, 986 (Fed. Cir. 1986) is in error. STATUTE OF LIMITATIONS CAN NOT APPLY, THE STATUS AS SOLDIER REMAINS UNTIL CHANGED BY JUDICIAL ACTION.

THE SPECIFIC ERRORS OF CLAIMS COURT

The Court of Appeals on page 3 of DISPOSITION (App. p. 4) says, "Mr. Smith makes several assertions about the merits of his case. The Court said they were IRRELEVANT. The Claims Court said in ORAL ARGUMENT pages 35 and 36 (App. 21, and 22), "But the fact that this error was made on your paper and corrected by Chandler, if that's all that happened, that would not give you any rights as far as entitlement to agreater amount of pay than you were paid." Petitioner considers that as approval of violation of 18 U.S. C. § 1001. Continuing on several sentences on p. App., "And so, if an error was made in designating you a Corporal, and the paper, in fact, should have been filled out as a PFC under the regulations, that's what had to be done." There is, petitioner believes, approval of another CRIMINAL ACT BY COURT. THAT STATEMENT HAS NO RELATION TO THE STATUTE OF LIMITATIONS. The issue of merits has

another application - in reference to the Claims Court as an appeal of the Army Board for Correction of Military Records. ABCMR Memorandum of Consideration (App. pages 12 through 20) shows authority for Board, Title 10 U.S.C. § 1552. App. p. 17 discusses the alleged error or injustice and p. 16 quotes that FAILURE TO FILE WITHIN 3 YEARS may be excused, if it finds it in the interest of justice to do so. The Court of Appeals says petitioner has not pointed to any infirmity in the court's analysis that would warrant reversal. Sawyer v. United States, 18 Cl. Ct. 860 (1989) define ERROR as either legal or factual. Injustice, when not also error, istreatment by the military authorities that shocks the sense of justice. If the Court of Appeals had considered these merits, as defined above it is clear there is GROSS LEGAL ERROR and SHOCKING INJUSTICE. The staff advisory opinion Ohio National Guard (App. p. 19) admits enlistment record was amended

-- it admits the report of National Guard duty performed for July 1951 listed petitioner under Corporal column -- deleted and relisted under PFC column. Petitioner believes, this evidence of CRIMINAL VIOLATION OF TITLE 18 U.S.C. § 1001 - Statements or entries generally. If being the victim of such a criminal act by the Government through its agents, the Army and National Guard does not QUALIFY AS ERROR AND INJUSTICE THEN petitioner does not know what would. The staff advisory opinion Ohio National Guard also mentions that, "available documentation renders it impossible to determine if Mr. Smith was factually enlisted as a Corporal." THAT IS NOT TRUE -- the TWO DRILLS for July 1951 PROVES IT. (App. last pages). The drills were on the 10th and 31 st of July 1951) The 10th was night of enlistment -- THUS IT WOULD HAVE HAD TO DISCOVER AND CORRECT ERROR THAT DAY TO PREVENT PETITIONER'S FACTUAL SERVICE AS CPL.

The date of this July 1951 duty report was 1 August 1951. ORAL ARGUMENT pages 35 and 36 (App. p. 21) The Claims Court says, " But anyway, there's no question you got your promotion to Corporal. So, the only time that you'd even have a puntive claim would be for the period from July 10, 1951 to the date you made Corporal." THE COURT WOULD NOT CONSIDER THAT THE CONTRACT WAS INVALID. ORAL ARGUMENT page 38 (App. p. 23) THE COURT: It couldn't have been illegal. It might be erroneous; it might be mistaken; it might be subject to being set aside because it's invalid for failure to follow applicable regulations but it is not illegal in the sense that a habeas corpus would apply to your being called to active duty in January or attending monthly meetings for pay with the Ohio National Guard." STATUTE OF LIMITATIONS ARE NOT INVOLVED, IN WHETHER THE ACT WAS LEGAL OR NOT. The Statute would only be applied to determine if petitioner

could seek relief in the courts. THIS REASONING WAS IN FACT A "DISMISSAL ON THE MERITS", SINCE IF THE "REJECTION" UNDER NATIONAL GUARD REGULATION 25 AT PARAGRAPH 56C AND THE ALTERATION OF ENLISTMENT RECORD AFTER THIS DISCOVERY OF ERROR ARE LEGAL, PETITIONER HAS NO CASE, STATUTE OF LIMITATIONS OR NO STATUTE OF LIMITATIONS. Thus both the Claims Court and Court of Appeals COMMITTED GROSS ERRORS THAT MUST BE REVERSED BY THIS COURT. CONTRACT LAW AND 13th. AMENDMENT.

TITLE 28 U.S.C. § 2501 HISTORICAL REVIEW

The statute goes back to the 1850's and revised in 1860's to include what is now § 2509 - Congressional references cases, especially § 2509(c) in which delay, or laches, statute of limitations are mentioned. § 2510(a) was changed to the Comptroller General from the Secretary of the Treasury and Executive Departments. Notice § 2510(a) the Comptroller General may transmit to the United States Claims Court for trial and ad-

judication any claim or matter of which the Claims Court might take jurisdiction on the voluntary action of the claimant, together with all vouchers, papers, documents, and proofs pertaining thereto." The Appeals Court refers to certain letters written during statute of limitation period.(App. p. 4.) The Department of Defense could have taken advantage of statute if it desired.

COMPARING 10 U.S.C. § 1552 WITH 28 § 2501

Title 10 U.S.C. § 1552(b) has the clause that the Board may excuse the failure to timely file in the interest of justice. The Claims Court and Federal Circuit have held that review of pay cases are subject to 28 U.S.C. § 2501 DESPITE THIS CLAUSE. Petitioner asks, WAS THIS INTENT OF CONGRESS, AND ANSWERS, NO. (1). § 1552(c) last sentence, "This section does not authorize the payment of any claim compensated by private law before October 25, 1951. (2). Senate Report No. 923, Oct. 8, 1951 [To accompany

H.R. 1181] Notice Statement, "The Committee on the Judiciary is of the opinion that this legislation, properly safeguarded, is a forward step in relieving the Congress of some of its burden with respect to the consideration of private bills." So this would appear to parallel Title 28 U.S.C. § 2509 (c) with the Boards determining the question of timely filing, in the first instance. The Senate Report No. 923, continuing, "The language proposed by the committee in new subsection (f) is; Note: Person receives a Dishonorable Discharge; All benefits are forfeited; A "Board" up-grades the Discharge to Honorable or under honorable Conditions; THIS ALLOWS THE PERSON TO BE ELIGIBLE FOR BENEFITS, FROM DATE OF CORRECTION. This applies to cases, many years after the statute of limiations MUST BE APPLIED UNDER § 2501, YET THIS PERSON COULD RECEIVE COMPENSATION, AND A PERSON WITH HONORABLE DISCHARGE IS DENIED RELIEF UNDER THE SAME LAW.

In Baxter v. Claytor, 652 F.2d. 181 (1981) page 185, "Although tecnically the Board may lack the ability to invalidate or overrule a court-martial conviction, see Goldstein v. Johnson, 184 F.2d. 342, 344 (D.C. Cir.), cert. denied. 340 U.S. 879, 71 S.Ct. 116, 95 L.Ed. 639 (1950), it does have the power to remove all traces of an invalid court martial from a serviceman's record and to change a dishonorable discharge into an honorable one." On the same page, "More over the Board has a nondiscretionary, judicially enforceable duty to exercise this power to correct such records if the records are based on unconstitutional military trials. See, e.g. Homcy v. Resor, 455 F.2d. 1345, 1348-49 (D.C. Cir. 1971); Ashe, 355 F.2d. at 280-81. IN PETITIONER'S CASE, HE WAS, IF "HABEAS CORPUS" WAS APPLIED "IN CUSTODY" WITH OUT ANY DUE PROCESS FOR OVER 18 MONTHS; YET THIS PERSON IS GRANTED RELIEF WHILE PETITIONER IS DENIED RELIEF UNDER THE

SAME STATUTE, Title 10 U.S.C. § 1552. The term "CORRECT" seems to be misused -- the National Guard used it to describe the ALTERATION of enlistment record, the Court Baxter case just cited, used it to change an accurate record of trial, that CASE LAW and Res Judicata rules applied. It also, applied a reduction in penalty, in what in reality was a pardon.

PETITIONER SUBMITS THAT, IF THE CRIMINAL APPLICATION IS NOT UNCONSTITUTIONAL, THE EXCUSING OF THE FAILURE TO TIMELY FILE, IN THOSE CASES, AND APPLICATION OF 28 U.S.C. § 2501 IN PAY CASES IS UNCONSTITUTIONAL.

In Hurick v. Lehman, 782 F.2d. 984 (Fed. Cir. 1986) [3] page 987, "Although the appellant urges us to follow contrary decisions of other circuits, under South Corporation we follow the decisions of our predecessor courts. JUSTICE REQUIRES THAT THERE BE ONE STANDARD FOR BOTH -- CLAIMS AND THE DISTRICT COURTS.

To conclude: Petitioner, respectfully submits that: (1) The enlistment contract was rejected by National Guard/Army. (2) The use of alteration in grade to conceal this fact, was beyond legal understanding of layman. (Even Claims Court said this was legal). (3) The contract REJECTION amounted to DISCHARGE FROM NATIONAL GUARD/ARMY. (4) Service after this date was INVALID. (5) Army could not SEPARATE petitioner because: (a) IT HAD NO JURISDICTION, CRIMINAL OR CIVIL.(b) Under Grimely, The Army as WRONG-DOER, had no authority to separate petitioner, the legal MAXIM, "you cannot judge own case" applies. THUS PETITIONER HAS NOT BEEN SEPARATED. (6) Error and/or Injustice (ABCMR) 10 U.S.C.§ 10 52(b) would require Court to overturn ABCMR's decision and rule in petitioner's favor. The Courts are misapplying 10 U.S.C. § 1552(b) on allowing excuse to timely file in pay v. up-grading of discharges etc.

For all the above reasons JUSTICE AND

LAW REQUIRE THE COURT TO GRANT PETITIONER'S PRAYER FOR WRIT OF CERTIOARI.

Respectfully submitted,

McClelland C. Smith
Petitioner Pro se

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NOTE: Pursuant to Fed. Cir. R. 47.8, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

93-5014

MCCLELLAND C. SMITH

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: February 9, 1993

Before RICH, Circuit Judge, PLAGER, Circuit Judge, and COHN, District Judge*.

PER CURIAM.

McClelland Smith appeals the October 9, 1992 decision of the Claims Court**, Docket No. 91-1652C, dismissing his complaint for failure to file within applicable statute of limitations. Finding no error in the

Claims Court's decision, we affirm.

* Honorable Avern Cohn, District Judge for the Eastern District of Michigan, sitting by designation.

** Renamed as the Court of Federal Claims on October 29, 1992. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902(a), 106 Stat. 4506, 4516 (1992).

DISCUSSION

On December 2, 1991, Mr. Smith filed his complaint in the Claims Court alleging that his 1951 enlistment and subsequent release from active duty in the Ohio National Guard were void on the grounds his enlistment record had been fraudulently altered. Specifically, Mr. Smith alleged that he was enlisted at the grade of corporal, but that his enlistment papers were subsequently changed, without his approval, to reflect his enlistment at the lower class of private first class. For relief, Mr. Smith sought correction of his military records,

back pay, and retirement benefits.

On March 31, 1992 the government filed a motion to dismiss the complaint for lack of jurisdiction on the grounds the complaint had not been filed within the statute of limitations prescribed by 28 U.S.C. § 2501 (1988) which states in relevant part:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim accrues.

On October 8, 1992, after hearing oral argument on the motion, with Mr. Smith appearing pro se, the court issued an opinion from the bench granting the government's motion on the grounds Mr. Smith's claim accrued back in 1951, when Mr. Smith became aware that his grade had been changed, and that he should have filed a claim with the Claims Court within six years of this date. On October 9, 1992, the court issued a written opinion memorializing its bench opinion.

On appeal, Mr. Smith asserts that the court erred by failing to consider certain letters written during the statute of limitations period. However, the relevant inquiry is whether Mr. Smith filed a complaint at the Claims Court within the prescribed period. Thus, Mr. Smith's assertions are irrelevant.

Mr. Smith next makes several assertions about the merits of his case. However, these are irrelevant to the issue of whether Mr. Smith filed his complaint within the applicable statute of limitations period.

Next, Mr. Smith charges that the court erred by failing to overturn a decision of the Board for the Correction of Military Records, which dismissed a claim Mr. Smith had previously filed before the Board. However, Mr. Smith has not pointed to any infirmity in the court's analysis that would

warrant reversal.

Finally, Mr. Smith asserts that the untimely filing of his complaint before the Claims Court should be excused under the provisions of 10 U.S.C. § 1552(b) (1988). However, that section is applicable only to claims brought before the Board for the Correction of Military Records.

For all the foregoing reasons, Mr. Smith has not shown that the Claims Court erred. Accordingly, we

AFFIRM

IN THE UNITED STATES CLAIMS COURT

No. 91-1652C

(Filed: October 9, 1992)

McCLELLAND C. SMITH,

Plaintiff

v.

THE UNITED STATES,

Defendant

ORDER

Pursuant to order, oral argument was heard on October 8, 1992, in the United States Claims Court, Washington, D.C.

Appearances

Plaintiff: McClelland C. Smith, pro se

Defendant: Steven J. Gillingham, Esq.

Maj. Mark Romaneski, Army JAG

Relevant Papers

Complaint, filed December 2, 1991

Defendant's Motion to Dismiss filed March 31, 1992

Plaintiff's Response filed April 27, 1992

Plaintiff's Statement of Facts, filed April 30, 1992

Defendant's Reply, filed May 11, 1992

Plaintiff's Rebuttal filed May 27, 1992

*****

Plaintiff is represented pro se, and the motion papers have been considered under the standard applicable to claims presented pro se. The pleadings and motion papers are required to be examined to determine whether, in the light most favorable to plaintiff, they can be construed as stating a claim for which relief can be granted under any theory within the court's jurisdiction. Haines v. Kerner, 404 U.S. 519 (1972). At the close of argument, the reasons for the decision were stated on the record.

Plaintiff served on active duty during World War II in the AUS (Army of the United States) from April 18, 1945, to December 7, 1946. He enlisted in the Ohio

National Guard on July 10, 1951. He was on active duty, entitled to pay pursuant to 37 U.S.C. § 204(a)(1), from July 13, to July 29, 1951, and from January 15, 1952, through September 1, 1953. Plaintiff contends his enlistment records have been altered and that he was improperly released from active duty. Plaintiff seeks back pay, correction of military records and eligibility for retirement.

The case is before the court on defendant's motion to dismiss pursuant to RUSCC 12(b). Military personnel claims based on pay mandating statutes and regulations traditionally have been within the general Tucker Act jurisdiction of the Court of Claims and this court. 28 U.S.C.§ 1491(a) (1988). See, e.g. Brown v. United States, 396 F.2d. 989 (Ct.Cl. 1968); Kirby v. United States, 201 Ct.Cl. (1973) cert. denied, 417 U.S. 919 (1974); Dehne v. United States, 970 F.2d. 890 (Fed. Cir.

1992). For purposes of dismissal on the pleadings under RUSCC 12(b)(1), the claim states a claim within the subject matter jurisdiction of this court. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Bell v. Hood, 327 U.S. 678, 682 (1946); Mindes v. Seaman, 453 F.2d. 197,198 (5th Cir. 1971); Bray v. United States, 785 F.2d. 989 (Fed. Cir 1986); Merck & Co. v. United States, 24 Cl.Ct. 73, 77-79 (1991).

Although the motion papers do not articulate his claim with precision, plaintiff's general theory is that the grade level of his 1951 enlistment contract was changed from CPL to PFC without his approval. This change, allegedly, voided his enlistment contract. As a result, plaintiff asserts he was not legally in the Ohio National Guard. Plaintiff argues his release from active duty and separation from the Ohio National Guard was invalid, and that he has not been legally separated from the

United States Army.

Plaintiff knew in 1951 that he was being paid at the rate applicable to a PFC and not at the rate applicable to a CPL. Plaintiff did not challenge his grade or pay status in the Army until June 26, 1989, in his application for correction of military records, or in court until December 2, 1991. An application to the ABCMR does not toll the running of the statute of limitations. Kirby v. United States, 201 Ct.Cl. at 539. Plaintiff's claim is barred by limitations. 28 U.S.C. § 2501.

Plaintiff's cause of action accrued and the statute of limitations began to run on the date of his separation from active duty status. Hurick v. Leman, 782 F.2d. 984, 986 (Fed. Cir. 1986).

On the basis of the foregoing, defendant's motion to dismiss under RUSCC 12(b)(4), failure to state a claim upon which relief can be granted is allowed. The

Clerk is directed to dismiss the complaint.

No Costs.

Kenneth R. Hawkins,

Senior Judge

DEPARTMENT OF THE ARMY

BOARD FOR CORRECTION OF MILITARY RECORDS

1941 JEFFERSON DAVIS HIGHWAY, 2ND FLOOR

ARLINGTON, VA 22202-4508

MEMORANDUM OF CONSIDERATION

IN THE CASE OF: SMITH, MCCLELLAND C.

405-28-7349

BOARD DATE: 8 JANUARY 1992

DOCKET NUMBER: AC90-10188

I certify that hereinafter is recorded the record of consideration of the Army Board for Correction of Military Records in the case of the above-named individual. The following members, a quorum, were present.

Mr. John Lee	Chairperson
Mr. John D. Miller	Member
Mr. Calvin M. Fowler	Member
Mr. David R. Kinneer	Executive Secretary
Ms. Mary L. Howell	Examiner

The Board, established pursuant to authority contained in Title 10 United States Code, Section 1552, convened at the call of

the Chairperson on the above date. In accordance with Army Regulation 15-185, the application and the available military records pertinent to the corrective action requested were reviewed to determine whether the application was filed within the time established by statute, and if not, whether it would be in the interest of justice to waive the failure to timely file.

The applicant requests correction of military records as stated in the application to the Board and as restated herein.

The Board considered the following evidence:

Exhibit A - Application for correction of military records

Exhibit B - Military Personnel Records (including advisory opinion, if any)

APPLICANT REQUESTS: That the Board determine if his 10 July 1951 enlistment contract with the Ohio Army National Guard was

void due to a change in his enlistment grade from corporal (CPL) to private first class (PFC).

PURPOSE: To determine whether the application was submitted within the time limit established by law, and if not, whether it is in the interest of justice to excuse the failure to timely file.

EVIDENCE OF RECORD: The applicant's reconstructed military record show:

The applicant was inducted on 18 April 18 1945 and served on active duty during World War II. His component was AUS (Army of the United States). He was honorably discharged on 7 December 1946 upon completion of 1 year, 7 months and 20 days of active duty. His highest grade held was Technician 5th Grade, which was the third lowest enlisted grade. During this period of time Technician 5th Grade (grade 5) was also referred to as CPL.

The applicant enlisted in the Ohio National Guard on 10 July 1951. His NGB Form 21 (National Guard Bureau Enlistment Record) showed the grade as CPL. CPL was lined through and PFC was written above the original entry. His education level was shown as 8 years.

War Department National Guard Bureau Form 100 (Report of National Guard Duty Performed) for the month of July 1951 shows an entry regarding the grade change from CPL to PFC which indicates that the applicant was reenlisted and requalified as a PFC. There is no evidence of record to show that he challenged the contract as erroneous and was denied relief, there is only own self statement 38 years later.

The applicant was ordered to active duty as a member of the Ohio National Guard on 15 January 1952. He was honorably released from active duty on 1 September 1953 and reverted to the control of the Ohio Nation-

al Guard. He was released from active duty in the temporary grade of CPL (CPL(T).

Effective 1 August 1948 the Army grade structure was changed and grade 5 became PFC. Effective 21 January 1951 the numbering of the grades was changed, which made grade 3 equal to PFC.

National Guard Regulation 25, at paragraph 56c, then in effect, authorized enlistment of qualified personnel in the National Guard of a state in the enlisted rating or grade held in the Army of the United States at the time of release or discharge.

Title 10 United States Code, section 1552 (b), provides that applications for correction of military records must be filed before 26 October 1961, or within 3 years after discovery of the alleged error or injustice, whichever is later. Failure to file within 3 years may be excused by a correction board if it finds it would be in the interest of justice to do so.

In the processing of this case, a staff advisory opinion (COPY ATTACHED) was obtained from the Office of the Adjutant General for the State of Ohio. It contains no information, advice or recommendation which would constitute a basis for granting the relief requested or excusing the applicant's failure to timely file.

DISCUSSION: The alleged error or injustice was, or with reasonable diligence should have been discovered in July 1951, the month it appears that the enlistment contract was amended. The time for the applicant to file a request for correction of any error or injustice expired on 26 October 1961.

The application is dated 26 June 1989 and the applicant has not explained or otherwise satisfactorily demostrated by competent evidence that it would be in the interest of justice to excuse the failure to apply within the time alloted.

DETERMINATION: The subject application was not submitted within the time required. The applicant has not presented and the records do not contain sufficient justification to conclude that it would be in the interest of justice to grant the relief requested or to excuse the failure to file within the time prescribed by law.

BOARD VOTE:

_____	_____	_____	EXCUSE FAILURE TO TIMELY FILE
_____	_____	_____	GRANT FORMAL HEARING
JDM	XX	XX	CONCUR WITH DETERMINATION

Mary L. Howell
for David R. Kinneer
Executive Secretary

AGOH-PA-MP-E (NGB-ARP-E/23) 2nd. End

CW4 R.A. Cline/dkb/889-7034

SUBJECT: Application for Correction of Military Records

The Adjutant General's Department, State of Ohio, 2835 West Granville Road, Columbus, OH 43235-2712 4 Jun 90

FOR National Guard Bureau, Enlisted Branch, ATTN: NGB-ARP-E, Washington, DC 20310

1. The enclosed DD Form 149 pertaining to McClelland C. Smith, 405-28-7349, has been reviewed along with oteher documents on file at this department.

2. Mr. Smith's enlistment record was amended from Corporal to Private First Class. The correction was made by the unit commander, there is no indication at what time the correction was made. The report of National Guard duty performed for July 1951 listed Mr. Smith's name under the Corporal column, but it was deleted and then relisted under the Private First Class column. All

subsequent reports have Mr. Smith listed as a Private First Class.

3. The aforementioned DD Form 149 and duty report established that Mr. Smith's enlistment contract was amended. However, available documentation renders it impossible to determine if Mr. Smith was factually enlisted as a Corporal.

4. POC for this correspondence is CW4 R.A. Cline (614) 889-7042.

FOR THE ADJUTANT GENERAL:

Robert Alel?? cw
for PAUL H. KORECKIS
COL,GS, OHARNG
Mil Pers Off

Encl

ORAL ARGUMENT -- October 8, 1992 - EXCERPTS

Starting page 35 line 21 through page 36.

THE COURT: By '53, the pay, rate and pay had gone up -- not nearly as much as it went up later -- but it had increased a lot from 1946 when you got out. But anyway, there's no question you got your promotion to Corporal. So, the only time that you'd even have apunitive claim would be for the period from July 10, 1951 to the date you made Corporal.

But the fact that this error was made on your paper and corrected by Chandler, if that's all that happened, that would not give you any rights as far as entitlement to a greater amount of pay than you were paid.

MR. SMITH: The grade that I was enlisted at, that contract, like all contracts, can't be changed.

THE COURT: But enlistment is not a normal contract. It is a representation that you

will go in and take that status and be paid according to law applicable to a person in that status. And they certainly would not allow any officer, any recruiting officer have the authority to authorize more pay and make a contract to pay more than the regulations and the statute allowed him -- authorized him to make. I mean, otherwise, he'd bring all his friends and make them rich and see, the government can't tolerate that.

And so, if an error was made in designating you a Corporal, and the paper, in fact, should have been filed out as a PFC under the regulations, that's what had to be done.

MR. SMITH: Uh, I cannot agree, Your Honor, that the paper, once it was signed, could be altered without my consent.

ORAL ARGUMENT -- October 8, 1992 EXCERPTS

Page 38 -- lines 5 through line 22.

MR. SMITH: The cases of error or injustice, my case would have been subject to a writ of habeas corpus relief.

THE COURT: No, never. It's not a criminal -- habeas corpus applies to a person who's held without law. Generally, it's a criminal matter and you were not involved in any criminal case here.

MR. SMITH: Your Honor, there is -- lets see here -- the case of restrictions -- " Restrictions on your liberty in the military is considered such if it is illegal." And the enlistment was illegal because --

THE COURT: It couldn't have been illegal. It might be erroneous; it might be mistaken; it might be subject to being set aside because it's invalid for failure to follow applicable regulations but it's not illegal in the sense that a habeas corpus would apply to your being called to active duty

in January or attending monthly meetings.

for pay with the Ohio National Guard.

ORAL ARGUMENT - October 8, 1992 EXCERPTS page 26 line 12 through line 24.

MR. SMITH: As we were talking here in the Pfile v. Corcoran that the United States is bound bound by their contracts such as anyone else and I ask the Court the question of how the company commander or anyone could, by their initials, imply that I had consented to this --

THE COURT: Well, you recognize, don't you, as a former member of the Armed Forces, that the enlistment contract is not the typical contract. It is a special kind of instrument and you can only -- the officer that appoints you or swears you in or takes your enlistment, cannot pay any more than he's authorized to pay a person with your experience or with the enlistee's experience.

Crane v. Hahlo, 258 U.S. 142, 42 S.Ct. 214 258 U.S. 146 says, "It has long been settled by decisions of this court that the word "Contracts" in section 10 of article 1 of the Constitution is used in its usual or popular sense as signifying an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts. "Mutual assent [express or implied] to its terms is of its very essence." Citations are omitted.

Iselin v. United States, 271 U.S. 136, 46 S.Ct. 458, at 459, [2] It is well settled that a proposal to accept or an acceptance upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. Citations omitted.

La Compania Bilbaina De Navegacion v. Spanish-American Light & Power Co., 146 U.S. 483, 13 S.Ct. 142 at 148, " The contention of the libelant is that the instrument became binding on the parties, with the exception of the particular clauses referred to, if the libelant should dissent from those clauses. Thus the same effect is claimed as if the charter party had been returned to the persons who had signed it, and the clauses referred to had been erased by mutual consent. But if there is any part of it in regard to which the minds of the parties have not met, the entire instrument is a nullity as to all its clauses." Citations omitted.

United States v. Royer, 268 U.S. 394, 45 S. Ct. 519 at 398 [5] We need not determine whether respondent might have maintained an action against the government for unpaid salary; but, clearly, the money having been paid for services actually rendered in an

office held de facto, and the government presumably having benefited to the extent of the payment, in equity and good conscience he should not required to refund it. In substance the case is ruled by Badeau v. United States, 130 U.S. 439, 9 S.Ct. 579, 583 (32 L.Ed. 997), where this court, referring to a similar situation, said: "But inasmuch as the claimant, if not an officer de jure, acted as an officer de facto, we are not inclined to hold that he has received money which, ex aeq bono, he ought to return."

Ex Parte Ellis, 105 Pac. Rep. 184, 186:

To be effective in the case at bar would make the court the judge of his own case and would violate the maxim, "Nemo debet esse judex in propria sua causa" -- "No man can be a judge of his own case." The maxim is as old as the law itself. Page 187, " There is no question but what said provision is self-operating, and it is regarded

as settled in this country that all negative or prohibitive clauses are self-executing. The Legislature, neither by neglect to act nor by legislation, can nullify a mandatory provision of the Constitution.

United States v. Grimely, 137 U.S. 147, 11 S.Ct. 54 at 55, "Enlistment is a contract, but it is one of those contracts which changes the status, and where that is changed, no breach of the contract destroys the new or relieves from the obligations which its existence imposes. Marriage is a contract; but it is one which creates a status. Its contract obligations are mutual faithfulness; but a breach of those obligations does not destroy the status or change the relation of the parties to each other. The parties remain husband and wife no matter what their conduct to each other,-- no matter how great their disregard of marital obligations. It is true courts have power, under the statutes of most states, to term-

inate those contract obligations, and put an end to the marital relations. But this is never done at the instance of the wrong-doer. The injured party, and the injured party alone, can obtain relief and a change of status by judicial action. Continuing several sentences omitted. "By enlisting the citizen becomes a soldier. His relations to the state and public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged. He cannot of his own volition throw off the garments he has once put on, nor can he, the state not objecting, renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts, the other party, the state, would not have entered into the new relations with him, or permitted him to change his status.

In re Blackington, D.C. Mass., 245 F. 801, affirmed 248 F. 124, page 803, "Voluntary enlistment rest on a contract between the recruit and the government. The contract is based on his offer of service and the acceptance by the military authorities. In making it, the parties deal at arm's length; neither occupies a fiduciary position towards the other; each looks out for his (or its) own interest. Whether the contract is binding is determined by the principles of law applicable to contracts generally. Duress, fraud, misrepresentation, avoid a contract of enlistment, as they would any other contract. In re Grimely, 137 U.S.147 11 S.Ct. 54, 34 L.Ed. 636.

Hurick v.Lehman, 782 F.2d. 984, 986 (Fed. Cir. 1986) [3] The appellant argues that the statute was tolled for the period in which his application for relief were pending before the Correction Board. As appell- conceded in the district court, however,

the Court of Claims has rejected that theory and has held that resort to a Correction Board is a permissive (rather than a mandatory) step, which does not suspend the running of the statute. Wilson, supra; Eurell v. United States, 566 F.2d. 1146, 215 Ct. Cl. 273 (1977); Kirby, supra. Although the appellant urges us to follow contrary decisions of other circuits, under South Corporation we follow the decisions of our predecessor courts.

[2] The district court corrected held that the statute of limitations barred the complaint. Under the decisions of the Court of Claims, which are binding precedent in this court, South Corp. v. United States, 690 F. 2d. 1368 (Fed. Cir. 1982) a claim based on an alleged unlawful discharge from the military service accrues on the date of discharge. Wilson v. United States, 231 Ct.Cl. 958 (1982); Bonen v. United States, 666 F. 2d. 536, 229 Ct.Cl. 144, cert. denied. etc.

Name SMITH, McClelland C. 69116 ASN 35 962 267

Date Enl. 10 July 51 For 3 years at Middletown, Ohio

Dr. Phy. Ex. Typhoid Booster

Home Address: 1007 Baltimore St, Middletown, Ohio 413 Curtis

Change of Status ~~Pvt.~~ PFC (10 Jan 52) (A.R. 615-5) Cpl

Inducted 15 Jan 52 into active military service of the United States,
per Act Mil Svc order #21
Hqs 2nd Army dtd 14 Sep 51
Sep for act mil svc 7 Sep 53

Prior Serv. None in DNG

GUARD FIRST BODY OF ROLL

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10 Jul 51 for 6 yrs; non disc | ar spl | o

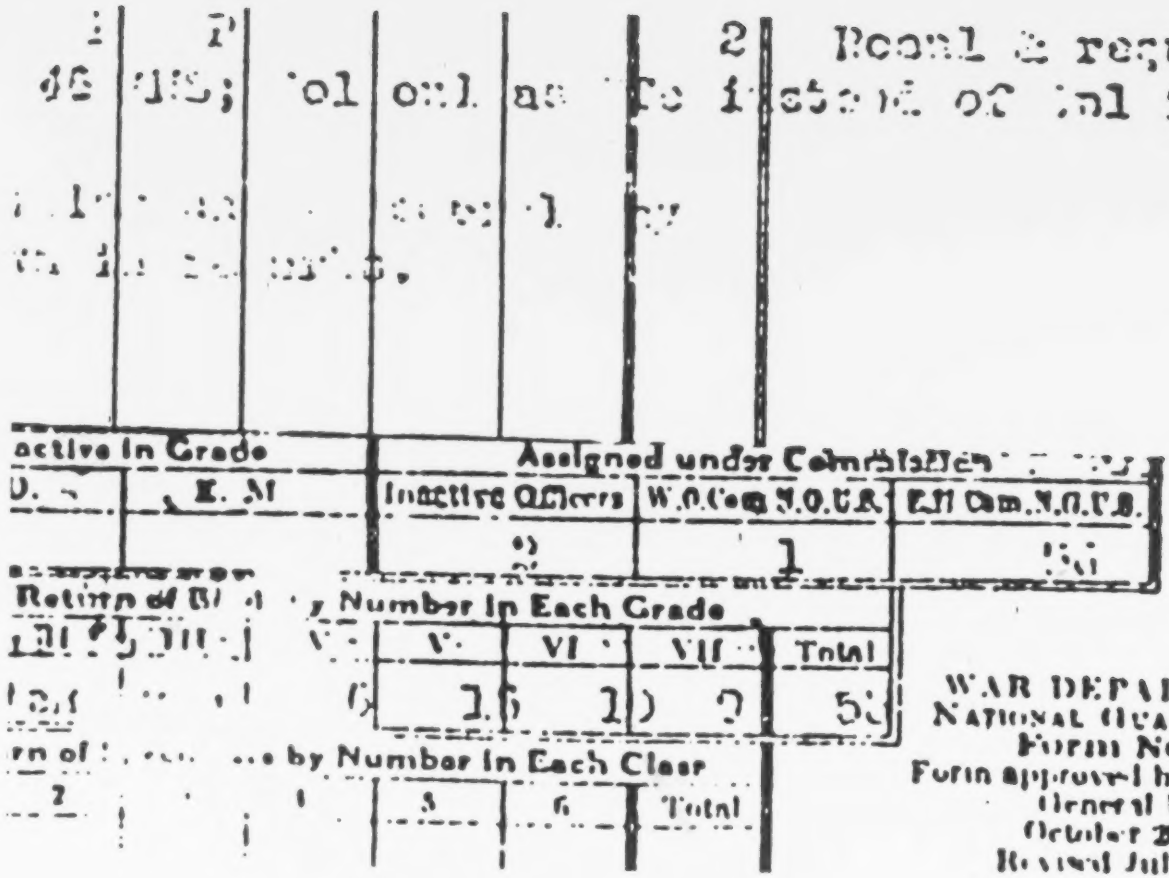
on WD AGO Form 21 | CMH | [illegible]

[illegible] | [illegible] | [illegible]

except [illegible] | [illegible] | [illegible]

Place [illegible]-town, Ohio Date 1 May 51

I certify from personal knowledge and from official records that the entries on this report are true and correct and that this report consists of [illegible] pages. The strength of this organization does not exceed [illegible] officers and [illegible] enlisted men as prescribed by the Adjutant General of Ohio by GO 7 dated 1[illegible] Jan 51



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U.	E. M.	Inactive Officers	W.O.Com. N.C.O.E.	En Com. N.C.O.E.	
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Returns of Bl	Number in Each Grade			
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	1	1	0	5

rn of	by Number in Each Class		
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[illegible] of Cal as shown

WAR DEPARTMENT
NATIONAL GUARD BUREAU
Form No. 100
Form approved by Comptroller
General U. S.
October 29, 1931
Revised July 1, 1928

Name SMITH, McClelland C. [illegible] ASN 35 962 267 Unit Co. F. 147th Inf.

Date Enl. 10 July 51 For 3 years at Middletown, Ohio Race Whi

Dr. Phy. Ex. Typhoid Booster S.P. Tetanus Booster

Home Address: 1007 Baltimore St, Middletown, Ohio 413 Curtis St. Middletown

Change of Status ~~Cpl.~~ PFC [illegible] Cpl

Inducted 15 Jan 52 into active military service of the United States, per Act Mil Ser order #21 Hq 2nd Army dtd 14 Sep 51

Sdep for ant mil ser. 1 Sep 53

Prior Serv. None in DNG

E. T. S.

Pvt 1c

Co F 147th Infantry